Majlis Peguam Malaysia v Aniza bt Abd Aziz (formerly practicing under the name and style of Tetuan Aniza Aziz & Assoc)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(A)-1883–10 OF 2019
KAMALUDIN MD SAID, CHE MOHD RUZIMA AND AHMAD ZAIDI JJCA
24 SEPTEMBER 2021

Legal Profession — Disciplinary proceedings — Disciplinary Board/Committee — Disciplinary Board affirmed Disciplinary Committee's decision that respondent committed misconduct under s 94(3)(c) and (o) of the Legal Profession Act 1976 — Disciplinary Board decided to strike respondent of the Roll of Advocates and Solicitors of High Court of Malaya — High Court replaced Disciplinary Board's decision with fine of RM15,000 — Whether learned judge was prohibited from exercising his discretion and jurisdiction to vary order on sentence meted out by Disciplinary Board — Whether order or sentence to strike out the Roll of Advocates and Solicitors was meted out in every cases of misconduct similar to respondent's misconduct — Legal Profession Act 1976 s 94(3)(c) & (o)

The respondent, an advocate and solicitor, was subjected to a disciplinary proceeding whereby the subject matter of the proceeding before the Disciplinary Committee ('the DC') was the failure of the respondent to return the balance purchase price of RM26,083.23 which remained due to the complainant under the sale and purchase agreement of which the respondent's firm was acting as stake holder for the complainant. The Disciplinary Board ('the DB') had decided to strike the respondent of the roll of advocates and solicitors of the High Court of Malaya ('the DB's order'). The respondent then filed an appeal against the DB's decision. In the appeal, after considering, inter alia, that: (a) the decision of DC was made without an opportunity of hearing the respondent's defense; (b) the bank account of the respondent's firm had been frozen by an injunction granted by the court in one civil suit and the account was only activated in December 2017, as such, this could be one of the factor that had caused the late payment of the balance sum; and (c) there was no clear evidence that the balance payment would not be paid by the respondent, the High Court had decided to replace the DB's order with a fine of RM15,000 ('the HC's decision'). The appellant's case was that the learned judge had confirmed that there were no compelling reasons to interfere with the findings of the DC and had in fact confirmed that the DB was correct to have affirmed the DC's finding that the respondent had committed a misconduct under s 94(3)(c) and (o) of the Legal Profession Act 1976 ('the LPA'), His Lordship

nevertheless proceeded to replace the DB's order with the HC's decision. The issues for consideration were: (i) whether the learned judge was prohibited from exercising his discretion and jurisdiction to vary the order on sentence meted out by the DB; and (ii) whether the order or sentence to strike out the roll of advocates and solicitors was meted out in every cases of misconduct similar to the respondent's misconduct.

Held, dismissing the appeal with costs of RM5,000 subject to allocator:

(1) The court could interfere in the sentence meted out by the DB. It could not be disputed that the court had the duty to judge whether, there existed extreme or special circumstances which may allow the court to intervene by replacing the DB's order with a proportionate sentence in the interest of justice which were done in many cases. The court agreed with the learned judge that there were special circumstances which he had found and considered, inter alia, that: (a) the decision of DC was made without an opportunity of hearing the respondent's defense; (b) the bank account of the respondent's firm had been frozen by an injunction granted by the court in one civil suit and the account was only activated in December 2017, as such, this could be one of the factor that had caused the late payment of the balance sum; and (c) there was no clear evidence that the balance payment would not be paid by the respondent. Having considered the above circumstances, the court held that it was not wrong for the learned judge to substitute the DB's order to a fine which in the mind of the learned judge was proportionate to the respondent's misconduct (see paras 47 & 59).

(2) It could not be disputed that there were cases where the order of sentence imposed by the DB on similar cases of misconduct was not consistent. It was also not disputed that the court in some cases had interfered with the punishment meted out by the DB on certain reasons. Therefore, it was not correct for the appellant to contend that the court did not have the power to substitute punishment already meted out by DB or was prohibited from making any intervention. What was expected of the DC or the DB was to keep a common trends in punishment or consistencies in meting out punishment especially in misconduct of similar nature (see para 58).

[Bahasa Malaysia summary

Responden, seorang peguambela dan peguamcara, telah dikenakan prosiding tatatertib di mana persoalan utama di dalam prosiding di hadapan Jawatankuasa Tatatertib ('JT') adalah kegagalan responden memulangkan baki bayaran pembelian RM26,083.23 yang kekal terhutang kepada pengadu di bawah perjanjian jual beli yang mana firma guaman responden bertindak sebagai pemegang amanah bagi pengadu. Lembaga Tatatertib ('LT') telah memutuskan untuk menggugurkan responden daripada Senarai peguambela

dan peguamcara Mahkamah Tinggi Malaya ('perintah LT'). Responden kemudiannya memfailkan rayuan terhadap keputusan LT. Di dalam rayuan tersebut, selepas mempertimbangkan, antara lain, bahawa: (a) keputusan JT telah dibuat tanpa peluang untuk mendengar pembelaan responden; (b) akaun bank firma responden telah dibekukan oleh injunksi yang diberikan oleh mahkamah dalam satu saman sivil dan akaun tersebut hanya diaktifkan pada Disember 2017, oleh itu, ini boleh menjadi salah satu faktor yang menyebabkan pembayaran lewat baki bayaran tersebut; dan (c) tiada bukti jelas bahawa baki bayaran tidak akan dibayar oleh responden, Mahkamah Tinggi telah memutuskan untuk menggantikan perintah LT dengan denda RM15,000 ('keputusan MT'). Kes perayu adalah bahawa hakim yang bijaksana telah mengesahkan bahawa tiada sebab yang kukuh untuk mengganggu dapatan JT dan sebenarnya telah mengesahkan bahawa LT bertindak dengan betul apabila mengesahkan dapatan JT bahawa responden telah melakukan salah laku di bawah s 94(3)(c) dan (o) Akta Profesion Undang-Undang 1976, namun Yang Arif hakim meneruskan untuk menggantikan perintah LT dengan keputusan MT. Isu untuk pertimbangan mahkamah adalah: (i) sama ada hakim yang bijaksana dilarang daripada menggunakan budi bicara dan bidang kuasanya untuk mengubah perintah hukuman yang dijatuhkan oleh LT; dan (ii) sama ada perintah atau hukuman untuk menggugurkan daripada senarai peguambela dan peguamcara telah dilaksanakan dalam setiap kes salah laku yang serupa dengan kes salah laku responden.

Diputuskan, menolak rayuan dengan kos RM5,000 tertakluk kepada alokator:

(1) Mahkamah boleh campur tangan dalam hukuman yang dijatuhkan oleh LT. Tidak boleh dipertikaikan bahawa mahkamah mempunyai kewajipan untuk menilai sama ada wujud keadaan ekstrem atau istimewa yang boleh membenarkan mahkamah campur tangan dengan menggantikan perintah LT dengan hukuman yang setimpal demi keadilan yang mana ini dilakukan dalam banyak kes. Mahkamah bersetuju dengan hakim yang bijaksana bahawa terdapat keadaan istimewa yang beliau dapati dan pertimbangkan, antara lain, bahawa: (a) keputusan JT dibuat tanpa peluang mendengar pembelaan responden; (b) akaun bank firma responden telah dibekukan oleh injunksi yang diberikan oleh mahkamah dalam satu saman sivil dan akaun tersebut hanya diaktifkan pada Disember 2017, oleh itu, ini boleh menjadi salah satu faktor yang menyebabkan pembayaran lewat baki bayaran tersebut; dan (c) tiada bukti jelas bahawa baki bayaran tidak akan dibayar oleh responden. Setelah mempertimbangkan keadaan di atas, mahkamah memutuskan bahawa tidak salah bagi hakim yang bijaksana untuk menggantikan perintah LT kepada denda yang pada fikiran hakim

yang bijaksana adalah setimpal dengan salah laku responden (lihat perenggan 47 & 59).

(2) Tidak boleh dipertikaikan bahawa terdapat kes di mana perintah hukuman yang dikenakan oleh LT ke atas kes salah laku yang serupa tidak konsisten. Ia juga tidak dipertikaikan bahawa mahkamah dalam beberapa kes telah mengganggu hukuman yang dijatuhkan oleh LT atas sebab-sebab tertentu. Oleh itu, adalah tidak betul bagi perayu untuk berhujah bahawa mahkamah tidak mempunyai kuasa untuk menggantikan hukuman yang telah dijatuhkan oleh LT atau dilarang daripada membuat apa-apa campur tangan. Apa yang diharapkan daripada JT atau LT adalah untuk mengekalkan trend yang sama dalam hukuman atau konsistensi dalam melaksanakan hukuman terutamanya dalam salah laku yang serupa (lihat perenggan 58).]

Cases referred to

Batu Malay a/l Thandy v Sures a/l Subramaniam & Ors [2015] 6 MLJ 286; [2015] 1 LSN 343, CA (refd)
Datuk M Kayveas & Anor v Bar Council [2013] 5 MLJ 640; [2013] 7 CLJ 533, FC (refd)
Dinesh Kanavaji a/l Kanawagi & Anor v Ragumaren a/l N Gopal (Majlis Peguam, intervener) [2018] 2 MLJ 265; [2018] 2 CLJ 1, FC (refd)
Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 MLJ 441, FC (refd)
Gana Muthusamy v LM Ong & Co [1998] 3 MLJ 341; [1998] 4 CLJ 878, CA (refd)
Jagdis Singh a/l Banta Singh v Outlet Rank (M) Sdn Bhd [2013] 4 MLJ 213; [2013] 3 CLJ 47, CA (refd)
Keith Sellar v Lee Kwang; Tennakoon v Lee Kwang [1980] 2 MLJ 191, FC (refd)
Majlis Peguam Malaysia v Hari Krishnan a/l Jeyapalan [2017] 1 MLJ 770; [2017] 4 CLJ 223, CA (refd)
Majlis Peguam Malaysia v Lim Yin Yin [2018] MLJU 986; [2018] 1 LNS 2003, CA (distd)
PP v Jafa bin Daud [1981] 1 MLJ 315 (refd)
Sivalingam a/l Periasamy v Periasamy & Anor [1995] 3 MLJ 395, CA (refd)
UEM Group Bhd (previously known as United Engineers (M) Bhd v Genisys Integrated Engineers Pte Ltd & Anor [2018] supp MLJ 363, FC (refd)

Legislation referred to

Legal Profession Act 1976 ss 94(3)(c), (3)(o), 100, 103B(4)(a), (4)(b), 103C, 103C(1)(c), (1)(c)(iv), 103D, 103E

Appeal from: Suit No WA-17D-18–08 of 2018 (High Court, Kuala Lumpur)

Janice Ooi (Skrine) for the appellant.
Aniza bt Abd Aziz (representing herself) for the respondent.

Kamaludin Md Said JCA:

INTRODUCTION

[1] The appellant appealed against part of the decision of the High Court judge at Kuala Lumpur delivered on 25 September 2019 ('the learned judge') which replaced the decision of the Advocates and Solicitors' Disciplinary Board ('ASDB') to strike the respondent of the Roll of Advocates and Solicitors of the High Court of Malaya ('ASDB order'), with a fine of RM15,000 ('HC decision').

[2] The appellant's case is that the learned judge had confirmed that there were no compelling reasons to interfere with the findings of the Disciplinary Committee ('DC') and had in fact confirmed that the ASDB was correct to have affirmed the DC's finding that the respondent had committed a misconduct under s 94(3)(c) and (o) of the Legal Profession Act 1976 ('the LPA'), His Lordship nevertheless proceeded to replace the ASDB order with the HC decision.

[3] We heard the appeal and having considered the appellant's and respondent's submissions, we are satisfied that the learned judge did not commit any error in exercising his discretion to replace or substitute the punishment meted out by ASDB ie from striking out the respondent of the Roll of Advocates and Solicitors of the High Court of Malaya to a fine of RM15,000 and the fine must be paid within 30 days from the date of the decision. In the result we dismissed the appeal with costs.

[4] We give our reasons as follows.

SALIENT BACKGROUND FACTS

[5] On 6 March 2014, the complainant's wife, Teoh, entered into the sales and purchase agreement ('SPA') with one Ismail bin Omar ('purchaser') for the sale of her apartment. The appellant acted for Teoh in the said transaction and was in fact a witness to the execution of the SPA.

[6] On 16 May 2016, the final portion of the purchase price amounting to RM50,807.04 was released by the purchaser's financier's solicitors to the respondent's legal firm, Messrs Aniza Aziz & Associates as stakeholder.

[7] On 31 May 2016, the respondent notified Teoh that her firm was in receipt of the final balance purchase price. On 17 March 2017, the complainant started contacting the respondent regarding the release of the stakeholder monies. Due to the absence of response from the respondent, the

complainant contacted the respondent again on 22 March 2017, followed by another communication on 24 March 2017.

[8] On 14 April 2017, the respondent made a partial payment of RM23,976.81 into the joint Maybank account of Teoh and the complainant. A balance of RM26,830.23 has yet to be released in full to Teoh. As a result of that, the complainant made further demands to the respondent on 14 April 2017, 19 April 2017, 20 April 2017, 4 May 2017, 10 May 2017 and 26 May 2017. The respondent failed to respond to any of these demands.

[9] On 25 April 2017, the complainant lodged the complaint to ASDB on behalf of Teoh, alleging that the respondent had failed to adhere to her duties as a stakeholder to release the final purchase price to Teoh.

[10] Pursuant to s 100 of the Legal Profession Act 1976 ('the LPA') the ASDB sent the respondent a letter dated 25 July 2017 seeking the respondent's written explanation regarding the complaint. No written explanation was received from the respondent.

[11] On 7 November 2017, ASDB appointed the DC to investigate and decide on the complaint. On 20 November 2017, the DC posted a letter to the respondent seeking the respondent's written explanation regarding the complaint. The documents specified in s 103B(4)(a) and (b) of the LPA were also sent to the respondent. Again, no written explanation was received from the respondent and she gave no indication as to whether she wished to be heard by the DC.

[12] On 4 January 2018, the respondent notified the appellant of the firm's (Messrs Aniza & Assoc) ('the firm') new address.

[13] The DC sent the respondent a notice to the firm's old address, providing the date, time and venue of the hearing on 9 February 2018 ('first DC hearing').

[14] The complainant was present at the first DC hearing while the respondent was absent. The hearing was postponed to 16 March 2018 ('second DC hearing'), and the complainant was asked to secure the attendance of Teoh at the next hearing.

[15] On 12 February 2018, the DC sent the respondent a notice to her firm's old address and her home address, informing her of the date, time and venue of the second DC hearing.

[16] During the second DC hearing, both the complainant and Teoh were present, where Teoh confirmed with the DC that the statements and contents in the record of complaint ('ROC') were made by the complainant on her behalf and that they were correct. Teoh further confirmed that her husband, the complainant had lodged the complaint on her behalf because she had been very busy with travelling. The DC proceeded to hear the complaint.

[17] On 9 April 2018, the DC made a recommendation to the ASDB that the respondent be struck off the Roll of Advocates and Solicitors. On 13 July 2018, the ASDB made an order pursuant to s 103D of the LPA to strike the respondent off the Roll of Advocates and Solicitors.

[18] On 17 August 2018, the respondent filed an appeal against the ASDB order pursuant to s 103E of the LPA ('the respondent's HC appeal'). The sealed copy of the originating summons and respondent's affidavit in support was served on the ASDB on 24 August 2018.

[19] On 26 September 2018, the appellant filed an application to intervene in the respondent's HC appeal. The appellant's application to intervene was allowed by the learned judge on 10 December 2018.

[20] On 25 September 2019, the HC decision was delivered. On 14 October 2019, this appeal was filed.

GROUNDS OF APPEAL

[21] There are several grounds raised by the appellant in the memorandum of appeal. However, in this appeal, the pertinent ground to be considered is the allegation that learned judge erred in law by failing to consider that the court must not substitute itself into the position of the Advocates & Disciplinary Board on the matter of sentencing, as the standards for the conduct of an advocate and solicitor are established by members of the profession and meted out by the Advocates and Solicitors Disciplinary Board.

[22] This is the crux of the appellant's complaint before this court since the learned judge despite affirming the ASDB's finding of misconduct/guilt against the respondent replaced the sentence imposed by ASDB with a lesser sentence. In other words, the respondent's appeal to reverse the finding of guilt by the DC/ASDB was dismissed by the learned judge but the sentence to strike out her of the Roll of Advocates and Solicitors by ASDB was varied. The focus in this appeal is more towards the learned judge's decision to replace or substitute the sentence meted out by the ASDB with that of the learned judge. Whether the decision is correct.

THE APPEAL

[23] We have read the record of appeal and the written submissions of the appellant and the respondent. We have also read the learned judge's grounds of judgment.

[24] During the oral submission by the appellant's counsel, we posed questions to counsel amongst others, whether the learned judge is prohibited from exercising his discretion and jurisdiction to vary the order on sentence meted out by the ASDB and whether the order or sentence to strike out the Roll of Advocates and Solicitors is meted out in every cases of misconduct similar to the respondent's misconduct. In other words, whether on similar facts and finding of misconduct the order or sentence meted out ie to strike out the Roll of Advocates and Solicitors were consistent.

[25] We posed such questions because firstly, in our observation, there are cases where the court has exercised its discretion to replace the sentence meted out by the ASDB with that of the court. The cases can be seen in the grounds of judgment of the learned judge. Secondly, in our observation there are cases where sentence imposed by the ASDB on similar cases of misconduct is inconsistent for example, there are cases of misconduct involving large sum of money where the sentence imposed on the affected advocate is light and there are cases of misconduct involved small amount of money whereby the affected advocate were struck out from the Roll of Advocates and Solicitors. In other words, what is required of the appellant's counsel is to show to this court the trends of sentencing or indication that sentence meted out by the ASDB in similar cases of misconduct is always consistent. Despite the question posed, we noted the appellant's counsel is unable to give a definite answer.

[26] We understood from the written submission, his instruction is to submit that the learned judge in this case was guilty of no or insufficient judicial appreciation of evidence and was plainly wrong in replacing the ASDB's order with the HC decision.

[27] By referring to the decided cases of *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441 (FC); *UEM Group Bhd (previously known as United Engineers (M) Bhd v Genisys Integrated Engineers Pte Ltd & Anor* [2018] supp MLJ 363 and *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395 (CA) his submission is that it is trite law that the appellate court should only interfere with the decision of the court below if it is shown that the court below was plainly wrong in arriving at its decision or has fundamentally misdirected itself that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion.

[28] The appellant's counsel also refers to the case of *Dinesh Kanavaji a/l Kanawagi & Anor v Ragumaren a/l N Gopal (Majlis Peguam, intervener)* [2018] 2 MLJ 265; [2018] 2 CLJ 1 (FC) ('Dinesh Kanavaji'), where the Federal Court held that the courts should only interfere with the finding of facts and recommendations of the DC in limited circumstances ie when the findings are manifestly perverse; the DC/ASDB had failed as right thinking members of the Bar to give due consideration to the facts of the case and the conduct of the solicitor complained against and where there had been breach of natural justice. Similarly, in the case of *Batu Malay a/l Thandy v Sures a/l Subramaniam & Ors* [2015] 6 MLJ 286; [2015] 1 LSN 343, the Court of Appeal unanimously found that in matters involving the discipline of the legal profession, it is best for the affected advocate and solicitor to be judged by his own peers through the statutory mechanisms mandated by the Act. The court can interfere but only in rare and exceptional cases. Otherwise it will be the court and not the profession that will determine the yardstick of professional behavior (see: *Gana Muthusamy v LM Ong & Co* [1998] 3 MLJ 341; [1998] 4 CLJ 878).

[29] The appellant's counsel submitted that notwithstanding the fact that the learned judge had referred to the Federal Court decision in *Dinesh Kavanaji* and concluded correctly that there is no error in the ASDB's decision to confirm the finding made by the DC that the respondent had committed a misconduct under s 94(3)(c) and (o) of the LPA and that there is no reason for His Lordship to interfere in such finding, His Lordship had ultimately decided to replace the ADSB's order with the HC decision. The learned judge was of the view that striking off the respondent from the Roll of Advocates and Solicitors was too harsh a punishment. The learned judge was guided by the decision in *Dinesh Kavanaji* where the Federal Court had replaced the sentence of being struck off from the Roll of Advocates and Solicitors imposed by the ASDB against the first appellant (who was found liable for breach of trust amounting to RM7m) with a five years suspension. The appellant submitted this is an error on the part of the learned judge on reasons that the Court of Appeal in *Majlis Peguam Malaysia v Lim Yin Yin* [2018] MLJU 986; [2018] 1 LNS 2003 set aside the High Court decision and restored the ASDB's order. The Court of Appeal's decision was upheld by the Federal Court. The case of *Lim Yin Yin* which was decided subsequent to *Dinesh Kanavaji* affirmed a decision by ASDB to strike off the respondent from the Rolls of Advocates and Solicitors for failing to remit/release the sum of RM815,120 being the balance of the purchase price which she held as stakeholder on behalf of her clients. In that case, the ADSB had decided to strike the respondent off the Rolls of Advocates and Solicitors. The High Court was of the view that the respondent's misconduct did not warrant a striking off and proceeded to replace the punishment with an order that the respondent be suspended from practice for a period of three years.

[30] It was further submitted that the Court of Appeal in *Lim Yin Yin* is of the view that a court will be entitled to intervene only if: (i) the punishment imposed by the DB will be considered to be manifestly excessive by the best thinking members of the legal profession; or (ii) manifestly wrong in the sense of being illegal. The present case does not come within the reach of that test and the learned judge ought not to have disturbed the DB's order. As such, the Bar Council's appeal was allowed. It must also be noted that in the case of *Lim Yin Yin*, even though the Court of Appeal was cognisant of the fact that the respondent was despondent because of her family financial difficulties and that the monies were ultimately returned to her client, hence resulting in a withdrawal of the complaint by the client, the Court of Appeal was still of the view that the striking off order made by the ASDB was appropriate. In this regard, the Court of Appeal held that the punishment of the solicitor concerned is not the sole consideration. The court must also consider the appropriate course the DB should take to protect the public and to register its disapproval of the conduct of the solicitor.

[31] Based on the Court of Appeal's decision in *Lim Yin Yin* which was upheld by the Federal Court, the appellant submitted that it is evident that it is not the amount appropriated by an advocate and solicitors in breach of its duty as a stakeholder that determines whether or not he/she ought to be struck off the Rolls. Ultimately, the question for determination is whether the respondent is a fit and proper person to be an advocate and solicitor of the court and if not, her ability to practice must be restricted. The Court of Appeal in *Lim Yin Yin* was of the considered view that an advocate and solicitor who had misappropriated funds belonging to his/her client, albeit with good reasons, is unfit to be an advocate and solicitor and ought to be struck off the rolls. Similarly, having misappropriated funds belonging to Teoh (without any reason) the respondent (who had chosen not to attend any of the DB hearings) ought to be considered unfit to be an advocate and solicitor. Consequently, the ASDB order ought to be reinstated.

THE HIGH COURT'S DECISION

[32] The respondent is the appellant at the High Court in an appeal brought by the respondent to challenge the decision by the ASDB in finding her guilty of misconduct and meted out a sentence to strike the respondent off the Roll of Advocates and Solicitors.

[33] The subject matter of disciplinary proceeding against the respondent before the DC is the failure of the respondent to return the balance purchase price of RM26,083.23 which remains due to the complainant under the SPA of which the respondent's firm is acting as stake holder for the complainant.

[34] The respondent raised several grounds in her appeal amongst others that she was not aware of the date of hearing set by the DC because she did not receive the notice send by the DC. She also denied handling the complainant's SPA because it was handled by another solicitor in her firm. She raised the issue of the complainant's locus standi to lodge the complaint. Finally, at the material time there was an injunction order made against the firm effective from April 2017 to 20 November 2017 and the firm's account was only activated in December 2017.

[35] The learned judge as we noted in his grounds of judgment has considered the respondent's appeal and also the submissions of the respondent and the appellant. Having considered the issues raised by the respondent and the replies from the appellant and also having relied on the case laws and relevant provisions of the law in support of the submissions, the learned judge made a finding that the respondent's appeal has no merit. The learned judge agreed with the decision of the DC/ASDB in finding the respondent guilty of misconduct under s 94(3)(c) and (o) of the Legal Profession Act 1967.

[36] The learned judge then dealt with the issue of sentence meted out by the ADSB against the respondent. According to the learned judge, the issue is very pertinent ie whether the sentence of striking the respondent off the Roll of Advocates and Solicitors is the appropriate sentence meted out for misconduct found against the respondent.

[37] Having appraised of the facts and the law applicable, the learned judge made his finding that the sentence imposed or meted out by ASDB against the respondent is not proportionate with the misconduct found by ASDB. The learned judge is of the opinion that replacing the sentence from striking the respondent off the Roll of Advocates and Solicitors to a fine is appropriate and proportionate with the respondent misconduct based on the facts and circumstances of the case.

[38] The decision was supported by some authorities referred by the learned judge. He applied the principles of law in the case of *Majlis Peguam Malaysia v Hari Krishnan a/l Jeyapalan* [2017] 1 MLJ 770; [2017] 4 CLJ 223 that the principle of proportionality in meting out sentences applies and *Dinesh Kanavaji* where the misconduct committed involved an offence of breach of trust for an amount of RM7m belonging to the aboriginal people however, the sentence of striking the first appellant's off the Roll of Advocates and Solicitors was substituted with suspension from practice as Advocates and Solicitors for a period of five years.

[39] In substituting the sentence, the learned judge has also took into consideration that the subject matter of the complaint is the failure of the

respondent to release the balance sum of RM26,830.23 to Teoh.

[40] The learned judge has made his finding that the ASDB has failed to consider the following facts:

(a) that the respondent's firm's account has been frozen by an injunction granted by the court in one civil suit and the account was only activated in December 2017. Accordingly, this can be one of the factor that has caused the late payment of the balance sum;

(b) the respondent's case was decided by the DC without an opportunity to hear the respondent's defense who not present before the DC; and

(c) there is no clear evidence that the balance payment would not be paid by the respondent and in fact the respondent has informed the appellant's wife a day after the respondent has received the proceed of sales of the house from the purchaser's solicitor.

[41] Based on the circumstances which the learned judge considered as pertinent to the respondent in this case, he found the sentence meted out by the DC/ASDB to strike the respondent's off the Roll of Advocates and Solicitors to be disproportionate with the misconduct of the respondent.

DECISION OF THIS COURT

[42] As far as the decision of the learned judge in affirming the DC/ASDB's decision on finding of misconduct against the respondent, that is not in issue. The principles of law in *Dinesh Kanavaji a/l Kanawagi & Anor v Ragumaren a/l N Gopal (Majlis Peguam, intervener)* [2018] 2 MLJ 265; [2018] 2 CLJ 1, *Jagdis Singh a/l Banta Singh v Outlet Rank (M) Sdn Bhd* [2013] 4 MLJ 213; [2013] 3 CLJ 47 and *Majlis Peguam Malaysia v Hari Krishnan a/l Jeyapalan* [2017] 1 MLJ 770; [2017] 4 CLJ 223, referred to and applied by the learned judge is correct. We agree with the learned judge with that decision and there is no compelling reason for us to interfere. In other words, the learned judge's finding that the DC's decision which was affirmed by the ASDB does not suffer from any defect and that the respondent is guilty of misconduct under s 94(3)(c) and (o) of the Legal Profession Act.

[43] We also agree with the appellant's submission that it is trite law that the appellate court should only interfere with the decision of the court below if it is shown that the court below was plainly wrong in arriving at its decision. The cases submitted by the appellant are very important as guidance to appellate court when hearing any appeals from the court below. The principles must be followed.

[44] In dealing with disciplinary matters and finding made by the

DC/ASDB, Justice Gopal Sri Ram (as he then was) in the Court of Appeal of *Gana Muthusamy v LM Ong & Co* [1998] 3 MLJ 341 at pp 344–345; [1998] 4 CLJ 878 at pp 344–345, said as follows:

> It is primarily for members of the Bar to decide what amounts to conduct unbecoming of an advocate and solicitor in particular circumstances, according to standards established by members of that honorable profession. Courts must necessarily exercise caution when entertaining an appeal in which the central question is whether particular conduct is unprofessional and cases meriting curial interference will be rare. Otherwise it will be the court and not the profession that will determine the yardstick of professional behavior. We would, in this context, express our agreement with the following passage in the Guide to the Professional Conduct of Solicitors issued by the Council of the Law Society in 1974, quoted by the learned judges of the High Court in their judgment:
>
> > One of the hallmarks of a developed profession is that it should lay down and maintain standards of professional conduct for its members based upon the best thinking of those members as to what constitutes proper conduct for a member of that profession.
>
> In our judgment, a court will be entitled to interfere only if what has been found by a Disciplinary Committee to be unprofessional conduct will not be considered to be such by the best thinking members of the profession. The present case does not come within the reach of that test and accordingly this appeal fails.

[45] In the case of *Keith Sellar v Lee Kwang; Tennakoon v Lee Kwang* [1980] 2 MLJ 191, the court further stated the following:

> We feel bound to reiterate here that the legal profession is an honorable profession whose members are expected to conduct themselves honorably. The appellants here were dealt with in a proceeding by virtue of a statute enacted to govern the conduct of members of their profession. Moreover, they were tried by their own peers. Members of the Disciplinary Committee were senior members of the profession who made firm findings of fact and they concluded that the appellants were guilty of misconduct in their practice as advocates and solicitors. The Chief Justice stated in Au Kong Weng's case that statutes relating to the legal profession nor entrust the supervision of advocates and solicitors conduct to a committee of the profession, for it knows and appreciates better than anyone else the standards which responsible legal opinion demands of its own profession.

[46] In fact the case of *Lim Yin Yin* submitted by the appellant held that:

> We emphasise that the protection of the public is not confined to the protection of the public against further default by the respondent alone. The protection of the public extends against similar defaults by other solicitors through the DB's public pronouncement of the seriousness of the respondent's misconduct. Accordingly, the punishment imposed must accord with the seriousness of the misconduct and leave no doubt as to the standards to be observed by other solicitors. In other words, the

punishment imposed should not only have a punitive effect, it must also have a deterrent effect.

[28] We would also add that there are other interests of the honorable profession to which the respondent is a member of and those of the courts, to consider ... the public too must be able to depend on the honesty and integrity of all practitioners in the legal profession which plays an indispensable role in the administration of justice and conduct of matters in law for members of the public.

[29] As such, there is a heavy responsibility on the DB and the court, a duty to the legal profession and to the community at large, to be careful not to accredit any person as worthy of public confidence and therefore fit to practice as an advocate and solicitor. Ultimately, the question for determination is whether the respondent is a fit and proper person to be an advocate and solicitor of the court, and the punishment to be meted is to be directed to ensuring that, to the extent that she is not, her practice is restricted.

[30] In our considered view, the fact that the respondent was despondent because of her family financial difficulties did not excuse the respondent from dipping into the client account and misappropriating clients' monies for her own use. This was a conscious, deliberate and calculated act on the part of the respondent. She knew that the monies which she misappropriated were monies belonging to her Clients and that she was obliged to pay the monies to the Clients by a certain date; the fact that she was unable to pay the monies to the Clients on the due date is uncontroverted.

[47] Be that as it may, back to the questions that we posed to the appellant's counsel earlier, having considered the law on appellate intervention and in respect of the decision by the DC/ASDB, the High Court did not interfere with the affair or jurisdiction of the ASDB in finding misconduct against the respondent which was not appealed against. However, the learned judge had interfered with the sentence meted out by the ASDB and substituted it with another sentence. The appellant submitted that the High Court should not interfere with the ASDB's decision in meting out sentence against the respondent. On the subject matter of sentence, in our considered view, the court can still interfere in the sentence meted out by the ASDB. It cannot be disputed that the court has the duty to judge whether, there exists extreme or special circumstances which may allow the court to intervene by replacing the order or sentence meted out by ASDB with a proportionate sentence in the interest of justice which were done in many cases that we have observed and cited by the learned judge. We cannot disagree with the learned judge that there are special circumstances which he has found and considered. Having considered it, in our view, it is not wrong for the learned judge to substitute the ASDB's decision on sentence to strike the respondent's Roll of Advocates and Solicitors to a fine which in the mind of the learned judge is proportionate to the respondent's misconduct. It is the learned judge's finding that the decision of DC was made without an opportunity of hearing the respondent's defense. The learned judge also considered that the respondent's firm's account has been

frozen by an injunction granted by the court in one civil suit and the account was only activated in December 2017. Accordingly, this can be one of the factor that has caused the late payment of the balance sum and finally, there is no clear evidence that the balance payment would not be paid by the respondent.

[48] We appreciated the reasons given by the learned judge and we are satisfied that the learned judge has not erred in interfering with the order or sentence meted out by ASDB. The learned judge is permitted to do so. This is not a case where the decision meted out by the ASDB was substituted without apparent reason.

[49] What we say is best illustrated in the case of *Majlis Peguam Malaysia v Hari Krishnan a/l Jeyapalan* [2017] 1 MLJ 770; [2017] 4 CLJ 223, referred to by the learned judge where the court set aside the order striking off the Roll and substituted it with a sentence of suspension for two years. The court held that:

> [31] As to the first appellant, having given due consideration to the first appellant's role in the scheme, we are of the view that *The DC and the DB were harsh in their recommendation and order that the first appellant be struck off the Rolls. We refer to the judgment of the Court of Appeal in Majlis Peguam Malaysia v Hari Krishnan a/l Jeyapalan* [2017] 1 MLJ 770; [2017] 4 CLJ 223 which followed the English decision of *Re A Solicitor* [1956] 1 WLR 1312 and the views expressed therein by Lord Goddard CJ and quoted at p 12 of the judgment which we adopt and agree with and we now quote:
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> > As I have said, *if there was any suggestion against the professional conduct of the solicitor, we should only interfere in the most extreme cases*, but the court has carefully considered the representations made on both sides and they are quite satisfied that, bearing in mind the finding of the committee that the appellant was guilty of conduct unbefitting a solicitor, which of course is not appealed against, *the order is one which is too severe considering the nature of the offence which was proved*. It was a shocking offence, no doubt, from a social point of view that a man should act in this way, but in one sense it is no worse in a solicitor than in anybody else and it is not an offence which can be passed over. We entirely agree that the committee did not think that they were bound Io pass this particular sentence. The expression which they use is one very well known to judges and chairmen of quarter sessions, they very often say they cannot overlook the offence and must pass a certain sentence. Having given this case the fullest and most anxious consideration, we have come to the conclusion that we shall set aside the order striking off the Roll and substitute therefor a sentence of suspension for two years.

[50] *Hari Krishnan Jeyapalan*'s case above shows that the ASDB must act fairly and to give a proper consideration of the misconduct committed by an advocate before passing sentence. ASDB must consider and deliberate on the mitigation factors presented before if before it metes out the appropriate punishment. ASDB must also consider the gravity of the offence; the

exculpatory conduct of the respondent and the conduct of the complainant since lodging the complaint. We reproduced the decision which held as follows:

> [21] However, we are of the view that the DB failed to take into account the principles of proportionality in coming to the decision that it did. Whilst we agree that the cheques dishonored were issued directly from the respondent's client's account which by itself is a serious offence and that it is imperative that the operation of the client's account must always be with honesty and integrity. The fact that the complainant withdrew his complaint must also be taken into account. We would fake the approach that looking at the offence, for the purposes of sentencing the respondent, right thinking members of file disciplinary board should consider and deliberate on the mitigatory factors presented before if before it meets out the appropriate punishment. In a situation where punishment ranges from reprimand and/or ensure to striking out from the Rolls, it would be expected of right thinking members of the DB to consider:
>
> (a) the gravity of the offence;
>
> (b) the exculpatory conduct of the respondent; and
>
> (c) the conduct of the complainant since lodging the complaint.

[51] The facts in the respondent's case herein is similar to the facts in *Hari Krishnan Jeyapalan*'s case where the respondent failed to release the payment of money to his client which he held as stakeholder. On appeal, the Court of Appeal was of the opinion that the striking off the Roll is a harsh sentence and taking into account the facts and circumstances of the respondent's case, the said sentence was substituted with sentence of fine only.

[52] At the outset, we did point out to the appellant the decision of the Federal Court in *Dinesh Kanavaji* which the learned judge has referred to in the grounds of judgment. The appellant's counsel in his submission preferred to refer to the Court of Appeal's decision of *Lim Yin Yin* (according to him was decided subsequent to *Dinesh Kanavaji*) which affirmed a decision by ASDB to strike off the respondent from the Rolls of Advocates and Solicitors for failing to remit/release the sum of RM815,120 being the balance of the purchase price which she held as stakeholder on behalf of her clients. The appellant contended that *Lim Yin Yin*'s case was upheld by the Federal Court. However, there is no written grounds from the Federal Court. Neither this court nor the High Court have the benefit of knowing the reasons in affirming the Court of Appeal's decision. The learned judge in the present case has the benefit of reading *Dinesh Kanavaji*'s written decision and cited the case in support of his decision. Be that as it may, in *Lim Yin Yin's* case, the Court of Appeal reversed the High Court's decision based on the general principles of law which has already been established. In *Lim Yin Yin*'s case, upon completion of the sale and purchase transaction, the respondent was obliged to immediately release the said sum to

A the clients on 29 December 2014. The respondent failed to do as such because the respondent had misappropriated the client's monies for her personal use. The respondent took out the clients' money from the client account for her own personal gain in clear breach of the trust reposed in her *qua* solicitor and in breach of her undertaking as stakeholder. The Court of Appeal held that this
B was a deliberate and calculated act by the respondent amounting to a breach of trust. Accordingly, the punishment imposed must accord with the seriousness of the misconduct and leave no doubt as to the standards to be observed by other solicitors. In other words, the punishment imposed should not only have a punitive effect, it must also have a deterrent effect. In the present case there
C was no deliberate act by the respondent as stated by the learned judge. *Lim Yin Yin*'s case can be distinguished on facts and gravity of the misconduct.

[53] The learned judge has referred to *Dinesh Kanavaji*'s case. The
D misconduct committed by the appellant is this case is very serious and grave involving an offence of breach of trust for amount of RM7m belonging the aboriginal people. The sentence originally meted out by ASDB to strike off the Roll of the appellant is substituted with a suspension from practice for a period of five years. This is a clear example where the court is clothes with the
E discretion to substitute the sentence if there is a valid ground to do so. *Dinesh Kanavaji*'s case has also referred to the principle of law in *Hari Krishnan Jeyapalan*'s case that a proper assessment must be done before meting out punishment. In the present case, we do not think that the learned judge when substituting the sentence meted out by ASDB to strike off the respondent from
F the Rolls of Advocates and Solicitors to a fine to the respondent based on the reasons that he has stated in the grounds of judgment has committed a grave error.

[54] There are other examples where the decisions by ASDB are very lenient.
G In *Datuk M Kayveas & Anor v Bar Council* [2013] 5 MLJ 640; [2013] 7 CLJ 533 (FC), the facts in that case is relatively similar with our present case. The appellants in that case were each fined RM5,000 for the misconduct. The misconduct of the appellant falls under the same section imposed on the respondent in the present case. The appellants, both partners in a legal firm
H ('the firm'), were found guilty of misconduct under s 94(3)(o) of the Legal Profession Act 1976 ('the LPA') by the Disciplinary Committee ('DC') for breaching their duties as stakeholders in respect of monies held by them in a conveyancing transaction in which the firm acted for the vendor. The appellants were each fined RM5,000 for the misconduct. The DC's decision
I was endorsed by the Disciplinary Board ('DB') under the LPA. The appellants' appeals against that decision both to the High Court and to the Court of Appeal failed. The appellants did not deny that they had breached their stakeholder obligation under the sale and purchase agreement ('SPA') as they had wrongfully released part of the stakeholder monies and, that too, to the

managing director of the vendor personally rather than to the vendor. Pursuant to a consent judgment recorded in court, the appellants were ordered to pay to the purchaser with interest the amount they had wrongfully disbursed. Although the purchaser withdrew his complaint against the appellants, the respondent on its own motion lodged a complaint against them under the LPA. The DC found the appellants' breach of their stakeholder obligations amounted to conduct unbefitting of an advocate and solicitor under s 94(3)(o) of the LPA. Both the High Court and Court of Appeal held that the breach of the stakeholder duty was not just contractual but a breach of fiduciary duty as the appellants were in the position of trustees of the monies for both the vendor and purchaser.

[55] In fact at para 29, p 660, the court in *Datuk M Kayveas*'s case stated that a breach of an undertaking, it is breach and breach alone that is of the essence. Once there is a clear case, both as to the undertaking and as to its breach, the breach of undertaking 'is itself misconduct and a serious dereliction of duty'. The court further states that members of the profession must be seen as wholly trustworthy in that, once they have undertaken a particular course of action, they can be depended on to act accordingly. That the duty to honor undertakings is strict meaning that even when a lawyer has erred or made an oversight, or that circumstances have changed radically, or for the lawyer to adhere to the undertaking will cause hardship, the lawyer must still adhere to the promises made.

[56] In the present case, the DC recommended to the ASDB that punishment to strike off the respondent from the Rolls of Advocates and Solicitors. It is not disputed that the power of the DC/ASDB to imposed penalty or punishment is provided under s 103C of the Legal Profession Act 1976 which says that:

> (1) Upon conclusion of the inquiry, a Disciplinary Committee shall record its findings in relation to the facts of the case and according to those facts shall determine and make any one of the following recommendations to the Disciplinary Board:
>
> (a) that no cause for disciplinary action exists;
>
> (b) that cause for disciplinary action exists but is not of sufficient gravity to warrant any punishment other than a reprimand or censure or that the circumstances are such that the advocate and solicitor should only be reprimanded or censured; or
>
> (c) that cause for disciplinary action exists and is of sufficient gravity to warrant the advocate and solicitor to be subject to one or more of the following penalties or punishments:
>
> (i) reprimand or censure;

(ii) imposition of a fine not exceeding fifty thousand ringgits;

(iii) suspension of the advocate and solicitor from practice, or in the case of a foreign lawyer, recommendation to the Bar Council for suspension of registration, for such period not exceeding five years as the Disciplinary Committee deems appropriate in the circumstances; or

(iv) striking the advocate and solicitor off the Roll or in the case of a foreign lawyer, recommendation to the Bar Council for revocation of the registration of the foreign lawyer.

(2) The Disciplinary Committee may in appropriate cases in addition to the recommendation of an appropriate penalty or punishment recommended that the Disciplinary Board make an order of restitution by the advocate and solicitor of the complainant's monies if it is established that such monies were or are held by the advocates and solicitor in his professional capacity and the complainant is entitled to the return of such monies or part thereof.

[57] In the present case the penalty or punishment imposed were made under sub-s 103C(1)(c)(iv) of the Act. The wording of s 103C(1)(c) of the LPA is set out in the manner that the advocate and solicitor to be subject to one or more of the penalties or punishments. It also sets out the extent of the DC/ASDB's power to impose fine and/or suspension. Section 103C(c) also employs the words 'that cause for disciplinary action exists and is of sufficient gravity ...' before imposing penalties or punishment. It is not disputed that in the respondent's case, ASDB chose to mete out punishment under sub-s 103C(1)(c)(iv) of the Act ie striking the Advocate and Solicitor Roll (the respondent) which punishment is the most serious one. Be that as it may, the general principles shall apply for example, in *Public Prosecutor v Jafa bin Daud* [1981] 1 MLJ 315, the court held that the phrase 'pass sentence according to law' means that sentence is passed according to the punishable section and is to be assessed with established judicial principle'.

[58] Based on the above said it cannot be disputed that there are cases where the order of sentence imposed by the ASDB on similar cases of misconduct is not consistent. It is also not disputed that the court is some cases has interfered with the punishment meted out by the ASDB on certain reasons. Therefore, in our considered view, it is not correct for the appellant to contend that the court does not have the power to substitute punishment already meted out by ASDB or is prohibited from making any intervention. As we have alluded to earlier, what is expected of the DC/ASDB is to keep a common trends in punishment or consistencies in meting out punishment especially in misconduct of similar nature. This is similar to what was said by the Federal Court in *Dinesh Kanavaji*'s case as follows:

[34] We would urge the DC in recommending the punishment to be meted out to give brief reasons as to why the DC had recommended the particular punishment

meted out bearing in mind the DC had options available, and the courts must be in a position to examine the same to decide whether the pendulum for punishment had swung too far in favour of striking off the Rolls.

CONCLUSION

[59] In conclusion we are satisfied that the learned judge did not commit any error in exercising his discretion in making an order to replace or substitute the sentence meted out by ASDB ie from striking out the respondent of the Roll of Advocates and Solicitors of the High Court of Malaya to a fine of RM15,000 and in ordering the fine to be paid within 30 days from the date of the decision.

[60] In the result, it is our unanimous decision that the appellant's appeal is dismissed with costs of RM5,000 subject to allocator.

Appeal dismissed with costs of RM5,000 subject to allocator.

Reported by Dzulqarnain bin Ab Fatar